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SUPREME COURT OF THE UNITED STATES OF AMERICA

MANHATTAN PROPERTIES, INC., Petitioner, *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of OLIVER A. OLSON CO., INC., bankrupt, Respondent.	No. 505.
SAMUEL R. BROWN, Petitioner, *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of UNITED CIGAR COMPANY OF AMERICA, bankrupt, Respondent.	No. 506.

BRIEF FOR NATIONAL ASSOCIATION OF CREDIT MEN, AS AMICUS CURIAE

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BRIEF FOR NATIONAL ASSOCIATION OF CREDIT MEN, AS AMICUS CURIAE.

Foreword.

The National Association of Credit Men has, by consent of counsel, been permitted to file this brief as *amicus curiae*.

This Association was organized in 1896 as a membership corporation, at which time no national bankruptcy law existed. The Association's first important activity was to advocate and aid the adoption of the Bankruptcy Act of 1898. It has today among its members all of the leading merchants, commercial corporations and banks of

the country, its membership enrollment being in excess of twenty thousand.

In almost every important bankruptcy proceeding, including the proceeding out of which this case arose, certain of its members are creditors for merchandise sold or money lent.

Because of these facts, the Association, on behalf of its members, is vitally interested in any decision in bankruptcy which lays down any general rule defining who shall be creditors and thus who shall be entitled to share in the assets of the bankrupt. For this reason, the National Association of Credit Men has seen fit to authorize the filing of this brief, in order that the court's attention may be specifically drawn to the effect of its decision in this case on the hitherto well-recognized rights of the extenders of commercial credit throughout the United States.

The question at issue with respect to the claims of landlords for future rent or damages in lieu thereof, has been most frequently discussed, either from the standpoint of the landlord, or from the standpoint of the tenant-debtor.

But in a bankruptcy proceeding, there are other parties, particularly creditors who have sold goods or lent money, and we shall discuss this case from the standpoint of such creditors, whose rights will be vitally affected, not only in this case, but in almost every bankruptcy proceeding now pending or hereafter instituted.

SUMMARY OF ARGUMENT.

POINT I.

Long established commercial distinctions between the claims of a landlord and the claims of other creditors should be respected, and this court should affirm the rulings for a long time followed in most of the circuits, and should disallow the landlord's claim.

POINT II.

This distinction between the landlord's claims and the claims of other creditors is founded, not only on commercial usage and necessity, but also on legal history.

POINT III.

Congress, in the Bankruptcy Act, intended to preserve this distinction and to bar the claims of landlords.

POINT IV.

Even if we disregard the peculiar nature of rent claims and treat this claim as one merely for damages for breach of contract, the claim is so contingent in character and extent as to be unprovable in bankruptcy in competition with the claims of other creditors whose debts are more fixed and certain.

POINT I.

Long established commercial distinctions between the claims of a landlord and the claims of other creditors should be respected, and this court should affirm the rulings for a long time followed in most of the circuits, and should disallow the landlord's claim.

Commercial law is largely the outgrowth of commercial usage and custom. From time immemorial, credit has been extended largely on faith in the debtor's financial position, shown by a statement of his assets and liabilities. In modern times, the custom has grown to demand from the merchant expecting credit a financial statement which lists with more or less particularity his assets and his liabilities. Almost every large extender of credit has in its employ a credit man whose duty it is to examine these statements, analyze them and evaluate the credit worth of the applicant.

Among the liabilities, there would appear accounts payable for merchandise sold or services rendered, bills payable for similar consideration or for money loaned, and other liabilities of like nature whose amount could be readily figured in dollars and cents and placed on one side of the balance sheet. The liability, if such it be, of an applicant for credit arising out of his duties as tenant under leases has heretofore never appeared among his liabilities on a financial statement and has never been calculated in any computation of his net worth for the purposes of credit. In fact, there is no way by which a credit man, even if he were informed of the existence of outstanding leases, could make any mathematical computation which would justify him in including a fixed and certain amount among the liabilities. If he were to include the total amount of the rent reserved for the balance of the term, the credit of most of the merchants in

the country would have to be seriously curtailed or completely denied and all that vast volume of the business of the country which is transacted on credit would be seriously affected.

The commercial customs of the country, as we shall hereafter point out in Point II, which make this sharp distinction between claims for future rent and other claims, have arisen because the courts and the legislatures have more or less consistently made the same distinction and have treated rent, or its equivalent, as something of a far different nature than a claim for goods sold and delivered or money loaned. The wisdom of the historical distinction may be theoretically arguable, but it has existed for centuries as a fact and that fact has strengthened the commercial usage; and reliance has been placed upon it by the extenders of credit. And no matter by what judicial process we may attempt to answer the question in this case, we cannot overlook the fact.

Under the present Bankruptcy Law, six out of nine of the Circuit Court of Appeals have ruled that the claims of landlords for future rent, or for damages for failure to pay future rent, cannot be proved in bankruptcy in competition with the claims of other creditors.

Slocum v. *Soliday,* 183 Fed. 410, 1st Circuit;
McDonnell v. *Woods,* 298 Fed. 434, 1st Circuit;
Matter of Roth & Appel, 181 Fed. 667, 2nd Circuit;
Trust Co. of Ga. v. *Whitehall Holding Co.,* 53 Fed. (2nd) 635, 5th Circuit;
Atkins v. *Wilcox,* 105 Fed. 595, 5th Circuit;
Wells v. *Twenty-first St. Realty Co.,* 12 Fed. (2nd) 237, 6th Circuit;
Britton v. *Western Iowa Co.,* 9 Fed. (2nd) 488, 8th Circuit;
Watson v. *Merrill,* 136 Fed. 359, 8th Circuit;
Colman Co. v. *Withoft,* 195 Fed. 250, 9th Circuit.

The leading case is undoubtedly *Matter of Roth & Appel, supra*, decided in 1910 by the Circuit Court of Appeals for the Second Circuit.

The lease in *Matter of Roth & Appel*, contained the following provision:

> "In case the lessee is declared bankrupt the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry."

If *Matter of Roth & Appel* is not to be expressly overruled by this court, its holding compels a determination of this case against the contentions of the landlord and in favor of the contentions of the general creditors.

For more than twenty-three years, that case has been followed extensively in seven out of nine circuits. In 1913, the Supreme Court cited *Matter of Roth & Appel* in a case which limited provable debts founded upon an open account or upon a contract, express or implied, so as to include only such as existed at the time of the filing of the petition in bankruptcy.

Zevalo v. *Reeves*, 227 U. S. 625.

In only two circuits out of nine has there been a decision against the holding of *Matter of Roth & Appel.*

In re Keith-Gara Co., 203 Fed. 585, affirmed 213 Fed. 450, 3rd Circuit;
In re Chakos, 24 Fed. (2nd) 482, 7th Circuit.

The cases in the third circuit which allow the landlord's claim for future rent for damages arise, for the most part, in Pennsylvania, where statute for a long time has given to the landlord a lien on the assets of the tenant, not only for past due rent, but for rent which may accrue to a certain extent. The statute is one of long standing and was noted by this court in the case of *Longstreth* v. *Pennock,* 87 U. S. (20 Wall) 575.

But even in Pennsylvania, the landlord's lien and the landlord's claim would not survive re-possession by the landlord. As the court said in the matter of *Keith-Gara Co., supra*:

> "Of course, if a landlord retakes possession of the property, his right to claim priority can no longer be enforced."

In other words, the landlord cannot have both the rent, or its equivalent, and the use of the premises.

So firmly fixed is this rule in Pennsylvania that the Circuit Court of Appeals for the Third Circuit has decided that where a landlord asserts his claim for future rent under a lease, he cannot, at the same time, take to himself rentals from sub-tenants, nor can he even use these rentals from sub-tenants as a credit or offset against the main lease liability, but he must first turn such collections over to the trustee and then prove his claim as a general creditor.

Rosenblum v. *Uber,* 250 Fed. 584.

In short, even in Pennsylvania, a landlord cannot have both the premises and a claim against the bankrupt for future rent. The cases in that third circuit, if it were not for the peculiar Pennsylvania statute, could easily have been decided in accordance with *Matter of Roth & Appel.*

The leading case in the seventh circuit which holds contrary to the doctrine of *Matter of Roth & Appel* is *In re Chakos, supra.* In that case, there was no discussion in the opinion, nor were any authorities cited, and there was no specific reference to *Matter of Roth & Appel.* The court contented itself with a statement that the landlord's claim for damages on the future rent should be allowed as a general claim "if and when liquidated". As to whether or not this claim of the landlord could be liquidated, the court says nothing.

It is not necessary at this point for us to argue the justice of the ruling in the case of *Roth & Appel;* it is sufficient for us to point out that it has been extensively followed in the courts and, of course, by the business community. Whatever the landlords may have thought or now think concerning the validity of the reasons which underlie that decision, they have been, for a long period of time, bound by this holding and it is to be assumed that they have shaped their course in accordance with that chart and have taken measures to protect themselves by closer scrutiny of the tenant's financial position and antecedents, by way of security in the form of deposit or bond, and in other ways. The creditmen likewise have for twenty-three years been aware of that decision and its controlling effect and, on their part, they had extended credits on the faith of that decision and in their computation of the net worth of the applicant for credit, they have justifiable disregarded the uncertain and contingent liability to the landlord.

Such a situation of reliance on a decided case should not be disturbed by this court merely because it may disagree with the reasons underlying the decision and, certainly not where there is no proof or suggestion of any material change in business conditions or the methods of doing business.

While this court may not be bound by the principle of *stare decisis,* particularly where the decision is one of

an inferior court, nevertheless, the strong and reasonable motive which impels courts to abide by the rule decided is here present with full force and effect.

It may reasonably be assumed that property rights of considerable amount have been acquired on the faith of that decision, of which both landlords and other creditors have been well aware for more than twenty-three years. If the case were one of recent origin, there would be no force to this point, but time has given to the decision an authority which cannot lightly be disturbed. The rules of commerce must be fixed and certain and, while courts and legislatures and the merchants themselves will strive to make these rules perfect, it is more important that the rules be permanent, rather than perfect. Business can be done with a faulty set of rules; business cannot be done with a constantly changing set of rules.

As this court said, in following long established decisions of the Circuit Court, in another particular:

> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance."
>
> *Maynard* v. *Elliott*, 283 U. S. 273.

POINT II.

This distinction between the landlord's claims and claims of other creditors is founded, not only on commercial usage and necessity, but also on legal history.

Time and again the courts have pointed to the historical distinction between "rent" and other debts. Justice HOLMES adverts to it in *Gardiner* v. *William S. Butler & Co.*, 245 U. S. 603, as follows:

"But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition, and we believe that it is the general understanding in that state that, in the absence of statute or express contract, a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee."

Rent issues out of the land and, in effect, it is some return to the landlord of the profits of the land which he has leased. When the landlord retakes his property, he receives back the whole of it, and at the same time, the tenant becomes unable to reap any profit out of it, and hence unable to pay a "rent" thereon.

Bosler v. *Kuhn,* 8 W. & S. 183 (Pa.).

No matter how archaic these conceptions of rent may be, they have left their impression on our judges and legislators, and on the layman, who can see no other definition than this: rent is paid for the use of land.

At all events, the use of the land is the consideration for which rent is paid.

Fifth Avenue Building Co. v. *Kernochan,* 221 N. Y. 370.

When the landlord repossesses himself of the land, the fixed and certain obligation to pay rent ceases.

Gardiner v. *William S. Butler & Co.,* 245 U. S. 603.

From that time on, the tenant ceases to receive value, and the landlord ceases to contribute towards the tenant's estate or assets.

Other creditors had added their merchandise or money to the common fund, which on bankruptcy will be shared

among them. So has the landlord, insofar as he has given possession or use of his land, but, after he has evicted the tenant, he no longer is contributing value to the common fund, and there is small wonder that the commercial creditors should look askance at any claim of the landlord for the equivalent of future rent.

Such claims can only arise by statute or by express contract.

By contract, the tenant may agree to remain liable for any deficit between rent reserved and rent actually received, and such contracts, as between the parties, will be enforced, although even here, there is an understandable reluctance on the part of the courts to recognize any such claim after the landlord has re-entered.

Michaels v. *Fishel,* 169 N. Y. 381.

In that case, the New York Court of Appeals said:

> "While it was within their power to agree that the lessee should continue to pay rent after the premises had been taken away from him owing to his default, still a covenant to pay, with no right to enjoy, should be clear and unambiguous as to the event which calls it into action, for, as was said by an old writer, 'a tenant can make no return for a thing he has not'" (7 Bacon's Abr. [7th Ed.] 57).

Even more reluctance is manifest when the landlord urges such a claim, not against the tenant, but against assets, in competition with creditors who have contributed thereto.

Kothe v. *R. C. Taylor Trust,* 280 U. S. 224.

In that case, the lease provided that the filing of a petition in bankruptcy should be a breach of the lease, and the landlord should be entitled to recover damages

for such breach in an amount equal to the amount of the rent reserved for the residue of the term. The court held that the clause must be construed as a penalty and unenforcible, and said:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate * * * not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably that would affect only those entitled to share in the proceeds of property beyond his control.
>
> The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor."

Disfavor must arise in any case where the assumed creditor has not contributed consideration of value to increase the bankrupt estate, and nevertheless, insists upon receiving a share of it.

The claim of a landlord for damages, in lieu of rent, after he has retaken the property, is such a claim. He is not in the same position as other creditors, who have parted with value, and it is unjust to permit him to share in the estate which their contributions have created.

POINT III.

Congress, in the Bankruptcy Act, intended to preserve this distinction and to bar the claims of landlords.

The claim of a landlord for damages, in lieu of rents, after re-entry, is *sui generis*, as we have seen, partly for historical reasons and partly from its fundamental injustice.

Nevertheless, Congress might have included such claims among those provable in bankruptcy, but we shall argue that Congress has not seen fit so to do, in the Act of 1898.

Section 63 of the present Act contains no express reference to such claims. Support for their allowance can be found only in the general statement that:

> "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account or upon a contract express or implied."

To this must be added the qualification that the debt, claim or demand, to be provable, must be in existence at the time of the bankruptcy.

Zavalo v. *Reeves*, 227 U. S. 625.

Did Congress intend to include, in its general language, claims contingent not only in amount but likewise in their very essence? These landlord's claims are such doubly contingent claims.

It was assumed by the Circuit Court of Appeals in this case that the Supreme Court has definitely ruled that under the language of Sec. 63 (a) (4), certain contingent claims were provable.

Maynard v. *Elliott*, 283 U. S. 273;
Central Trust Co. v. *Chicago Auditorium*, 240 U. S. 581.

But not all contingent claims are provable.

Dunbar v. *Dunbar*, 190 U. S. 340.

We shall discuss these cases at greater length in our Point IV; suffice it to say here that none of those cases arises out of the relationship of landlord and tenant.

That relationship is so peculiar and has been so from time immemorial, that it might and should receive express treatment in any bankruptcy act. Its omission in this Act is significant of Congressional intent not to include it.

The Act of 1867 expressly refers to rents:

> "Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."
>
> *Sec. 19*, Bankruptcy Act of 1867.

The same Section 19 said further:

> "No debts other than those above specified shall be proved or allowed against the estate."

The Act of 1841 did not mention landlords, as creditors, although it listed various holders of contingent claims

> "whose debts are not due and payable until a future day; all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt."
>
> *Sec. 5*, Bankruptcy Act of 1841.

With that Act in mind, Congress, in the 1867 Act, enlarged the list by adding landlords, to a certain extent.

In the Act of 1800, Sec. 39, provision was made for the allowance of claims payable at future days, as if they were payable presently, and also for the allowance of certain contingent claims, on bottomry and respondentia

bonds and policies of insurance, after the contingency or loss has occurred.

The action of Congress in thus ignoring the contingent claims of landlords should be compared with the action of the British Parliament during the same period, merely as an example of what a legislature would do, if the landlord were to be included.

See

Columbia Law Review, Vol. XXXIII, No. 2, February, 1933.

In England, in the statute of 1883, 46 and 47 Vict., Chapter 52, Parliament, in Section 37, used the most general and all inclusive language in permitting proof of "all debts and liabilities, present or future, certain or contingent" and, further, in the same statute, Section 37, Sudivision 8, liability was thus defined:

> "'Liability' shall, for the purpose of this act, include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

Nevertheless, and in spite of this seemingly all inclusive language, Parliament deemed it necessary to provide

expressly for the allowance of the claim of a landlord in those cases where the trustee disclaimed the lease. After providing for the process of disclaimer, with particular reference to leases, Parliament said:

> "(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt in the bankruptcy."

Our Congress has never seen fit so to do and the landlords are, therefore, forced to find in the most general language support for their most special and peculiar claims.

Nor can it be argued that Congress was of the opinion, that its definition of provable debts in Sec. 63 of the Act of 1898 included the claims of landlords for future rent, and therefore, did not expressly say so.

In 1933, Congress amended the Bankruptcy Act (March 3, 1933, Chapter 204, 47 Stat.), and added provisions for composition and extensions by debtors, not bankrupt, on notice to creditors.

In the Amendment of 1933, Congress defined creditors, for the purposes of an extension, but not for the purpose of a composition, as follows:

> "The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title. A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63 (b) of this title."

And the term "debt" was thus defined:

> "The term 'debt' *for the purposes of an extension* proposal under this section shall include all claims

of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title." (Italics ours.)

The distinctions between an extension and a composition are clear; the extension implies continuance in business, continuance of liability and no discharge; composition implies a discharge on payment of some fixed or agreed consideration. In the extension proceedings, landlords are mentioned and provision is made for their claims, because presumably the debtor retains possession of the premises and is not discharged from his debts. In the composition proceeding, the landlord is not mentioned, because composition implies discharge, and Congress knew that landlords' claims were not dischargeable in bankruptcy and hence not provable.

Now, if the Act of 1898, as it then stood, was intended by Congress to include as provable debts the claims of landlords for future rents, there would be no necessity to make special mention thereof in the amendment. Here was a frank admission, not only of the peculiar nature of landlords' claims, but also of their hitherto unprovable character.

The claim of a landlord for future rent, or damages, is peculiar in nature and history. Such claims are not favored by the law, even between the parties. In bankruptcy, where the rights of other creditors supervene, such claims are even less favored. Congress did not include them expressly, and the amendment of 1933 establishes the Congressional intent to exclude them from the ordinary bankruptcy proceedings.

For over twenty-three years, courts generally had followed the rule of *Matter of Roth & Appel, supra*, and Congress had not seen fit to amend the law in that respect.

If a change were to be made, such change should come from Congress which would have power to establish at the same time a uniform system for the treatment of landlords' claims, in the same way as the English Parliament had done. Credits which have been extended on the faith of the unprovability of landlords' claims would not be disturbed; future credits would be regulated and extended in accordance with Congressional action.

POINT IV.

Even if we disregard the peculiar nature of rent claims and treat these claims as merely for damages for breach of contract, the claims are so contingent in character and extent as to be unprovable in bankruptcy in competition with the claims of other creditors whose debts are fixed and certain.

Disregarding history and commercial usage and adopting, for the sake of the argument, a construction of the Act of 1898, which would treat a landlord's claim for future rent as no different than the claim of a merchandise or other contract creditor, we shall here contend that these claims fall under the ban of those contingent claims which are not or should not be provable.

The rulings of this court in *Maynard* v. *Elliott,* 283 U. S. 273; *Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549 and *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, hereinafter discussed, are not inconsistent with the proposition that under the existing Bankruptcy Law, certain contingent claims are not provable.

In *Dunbar* v. *Dunbar,* 190 U. S. 340, the bankrupt had agreed to pay to his wife, for her support, certain sums until she should remarry. The husband had obtained his discharge and when sued by his wife upon the agreement for instalments falling due thereafter, he interposed

the discharge as a defense. If the claim were provable, it was likewise dischargeable.

This court pointed to the provision of the contract by which payments would cease in case the wife remarried, and held that the claim could not have been proved in bankruptcy "because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood."

In reaching that conclusion, the court relied on a decision under the Act of 1841, and said:

> "Mr. Justice Bradley, in *Riggin* v. *Magwire,* 15 Wall. 49, speaking for the court, said, that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the Bankruptcy Act of 1841. The fifth section of that act gave the right to prove 'uncertain and contingent demands' but it was held that a contract such as above described was not within that section."

Likewise, in the case of a landlord's claim to recover the deficiency between rent reserved and rent actually received, it is by no means certain that an actual duty or liability will arise under the contract.

When is there a deficit? Under some forms of leases, there is no deficit and hence no liability until the very end of the term. *Hermitage Co.* v. *Levine,* 248 N. Y. 335. We quote from that case:

> "The question is still left, how often and when shall the damage be computed? Is there to be a single cause of action in which all the damage will be computed down to October, 1945, or are there to be monthly causes of action to recover successive deficits, though conceivably new leases made when the present ones are over will make the net result a surplus?

No doubt, a damage clause can be drawn in such a way as to make a tenant responsible for monthly deficits after the re-entry of his landlord, and this without charging the landlord with a duty to account for a surplus in other seasons. Such a clause will be found in McCready v. Lindenborn (172 N. Y. 400), where the lease was to the effect that the tenant would pay the difference in rent 'in equal monthly payments as the amount of such difference shall from time to time be ascertained'. A clause similar in effect, though more uncertain in its terms, will be found in Mann v. Munch Brewery (225 N. Y. 189), where the tenant was to 'continue liable for the payment of the rent and the performance of all the other conditions herein contained'. None the less, in the absence of a provision that points with reasonable clearness to a different construction, a liability for damages resulting from a reletting is single and entire, not multiple and several. The deficiency is to be ascertained when the term is at an end (Harding v. Austin, 93 App. Div. 564 [per Willard Bartlett, J.]; Halpern v. Manhattan Ave. Theatre Corp., 173 App. Div. 610; 220 N. Y. 655; Darmstadt v. Knickerbocker C. & E. S. Co., 104 Misc. Rep. 547, App. Term, per Lehman J.; 188 App. Div. 129). The tenant when ejected ceases to be a tenant. What he covenants to pay is the damage, not the rent. To hold him for monthly deficits is to charge him with the obligations of a tenant without any of the privileges. He must pay in the lean months, without recouping in the fat ones. He must do this, though it may turn out in the end that there has been a gain and not a loss. A liability so heavy may not rest upon uncertain inference."

In other forms, the liability for a deficit might arise month by month. *McCready* v. *Lindenborn,* 172 N. Y. 400.

But, who is to say how long this liability continues, dependent as it is upon the continuance of the monthly deficit?

Each month's experience would furnish the basis for a separate liability and no one could forecast, even approximately, when the liability, if ever, would arise or how long the condition would exist.

Whether or not a duty or liability will ever arise depends upon many contingencies, not predictable and altogether uncertain in their nature.

The premises must continue in existence, despite the risk of fire, earthquake and flood, for the destruction of the premises would release the lessee, under prevailing statutes and usually by contract, and the existence of a rentable subject matter must be preserved as a condition of any liability. When, if ever, will the fire happen? As the court, in *Dunbar* v. *Dunbar, supra,* could not predict when, if ever, the wife would remarry, so here we must admit our inability to forecast the future life of the premises.

The building or land may be taken by the Government, under its power of eminent domain. The landlord, thereby, loses his title and right to possession of the property, and necessarily the power to relet. The liability of the tenant to pay a future deficit never arises.

The landlord may likewise lose his title by foreclosure of mortgage, and that contingency would apply to future as well as present mortgages.

In any of these instances, liability never attaches, after the landlord is deprived of his rentable building, and when that event shall happen, no man can tell. Calculation will not help to avoid the uncertainty.

Computation of future rental value must always, at best, be qualified and conditioned upon the *future* existence of the premises, in their present or demised condition, and any honest expert must so qualify his opinion.

Even were he to disregard the uncertainty of the future of the building, he would be still beset with other unpredictable conditions, such as, the general rental

market depending on general good times or bad, and the possible changes in that particular neighborhood which might make it a better or worse location.

Present rental value can be proven with reasonable certainty, but we are here concerned with *future* rental value, as to which we can have nothing better than a guess.

A claim, founded as to liability and as to amount, on guesswork, should not compete, in the distribution of bankrupt estates, with claims founded on certainties. The merchandise creditor is not permitted to speculate upon the quantity of goods he delivered, nor may the banker draw on his imagination as to the amount of money lent, or the fact of the loan.

The spirit of the Bankruptcy Act conserves the assets for distribution among creditors who are such upon a fair and adequate consideration. Their dividends should not be reduced by the allowance of landlords' claims, uncertain as to liability and unascertainable in amount.

This court has not held in any of its decided cases that a claim was provable in bankruptcy where *both* the liability was uncertain and the amount unascertainable. In the decided cases which we are called upon to distinguish, there was no speculation as to the existence of a liability, present or future. Where this certainty of liability existed, a somewhat speculative measurement of damage has been permitted in some cases. The type of cases we refer to are:

Williams v. *U. S. Fidelity Co.*, 236 U. S. 549.

(Obligation of principal to indemnify his surety, on a joint bond, given to insure performance of a building contract.)

Central Trust Co. v. *Chicago Auditorium*, 240 U. S. 581.

(Contract to furnish livery and other services for a hotel.)

Maynard v. *Elliott,* 283 U. S. 273.

(Obligation of indorser on promissory note.)

Schultz v. *Guthrie,* 235 Fed. 907.

(Contract of personal employment.)

In re Portage Rubber Co., 296 Fed. 289.

(Contract for sale of goods.)

None of these were cases of landlord and tenant.

The difference between the relationship of landlord and tenant and the other contract relationships has been used by this court and others as one broad ground for distinction. In *Central Trust Company* v. *Chicago Auditorium, supra,* this court indicated that the provability of the claim therein might be contrary to the rule of *In re Roth & Appel, supra,* and said:

> "Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the mere personalty.' Co. Litt. 292, b, Sec. 513."

In the *Portage Rubber Co.* matter *supra,* the Circuit Court of Appeals in the Sixth Circuit, observes the same distinction, and remarks that cases in the law of real property are outside the provision (Sec. 63 [a] 4).

Disregarding this historical distinction, there are certain essential differences between claims of the kind allowed and the landlord's claim.

In *Williams* v. *U. S. Fidelity Co., supra,* the bankrupt had contracted to build a school house and the U. S. Fidelity Company had given its bond to assure completion. The bankrupt agreed expressly to indemnify the fidelity company against any loss on its bond. A default occurred on November 9, 1900, and the School

Board took possession and completed the contract on April 13, 1901, and on May 14, 1901, demanded of the surety and principals, the payment of the loss. Thereafter, the contractor went into bankruptcy on May 28, 1901.

The liability was fixed and certain in amount; the obligation to reimburse the surety company was perfect, except for one condition only, payment by the surety company of the amount of the loss. That condition was solely within the control of the surety company. Furthermore, the debt could have been proved by the surety under General Orders 21-4. This court held there was no uncertainty.

But the conditions upon which a bankrupt tenant may become liable to his landlord for a deficiency in future rents are by no means within the control of the landlord, as we have seen. These conditions may be affected by natural causes, such as fire, governmental action, and general future business or market conditions. The cases are utterly different.

In *Central Trust Company* v. *Chicago Auditorium, supra,* the bankrupt had been granted the baggage and livery privileges of the Auditorium Hotel, for a term of five years. For the baggage privilege, he agreed to pay the sum of $6,000 and for the livery privilege, the sum of $15,000. Both of these payments were to be made in monthly instalments.

When bankruptcy occurred, the hotel company filed a claim for unliquidated damages caused by the breach. This court held that the bankruptcy of the licensee did constitute an anticipatory breach of the contract, and there was a provable claim under Section 63 (a) 4, and the damages may be liquidated under Section 63 (b).

But in that case, there was a fixed and certain liability of the bankrupt to pay $6,000 for the entire baggage privilege, and $15,000 for the entire livery privi-

lege, which liability would most certainly mature month by month and fall due. The liability arose when the contract was signed, and not month by month as the instalments matured. It was an executory contract and thus differed from the historical conception of a lease as this court took pains to note, as above referred to.

In *Maynard* v. *Elliott, supra,* the bankrupt was liable as an indorser of promissory notes, maturing after bankruptcy. Liability existed from the day the bankrupt indorsed the notes, but there was annexed to his liability, two conditions: (1) that the maker would not pay on maturity, and (2) that necessary steps would be taken by the holder to charge the indorser. The latter contingency was solely within the control of the holder and there could be little or no uncertainty as to that. The former contingency related to the solvency of the maker and although Justice STONE does not refer to the fact in his opinion, it appears from the record that the maker was "hopelessly and wholly insolvent at the time the petitions in bankruptcy were filed." (Agreed statement of Record on Appeal in Petition for Certiorari in *Rutherford* case, Para. 15, p. 6.)

In the record on appeal in the Circuit Court of Appeals (40 Fed. [2nd] 17), there appears a stipulation as follows:

> "(7) A stipulation was filed agreeing that at the time the petitions were filed and continuously to that time the payor and payee of the note were wholly insolvent and both had been discharged in bankruptcy." (Page 6 of Agreed Statement of Record on Appeal in *John V. Varney* appeal.)

There was, therefore, no doubt, legal or otherwise, as to the insolvency of the maker or his inability to pay.

In *Schultz* v. *Guthrie, supra,* the District Court of Massachusetts allowed the claim of an employee for damages for breach of the contract of employment. The

breach in that case was the filing of the petition. It appears that before allowance of the claim, the employee had secured other employment and he was allowed to prove, as damages, an amount equal to his wages for the actual period of unemployment. Such damages have been universally allowed in actions at law on such executory contracts and in that particular case, they were readily ascertainable. In cases like these, the damages are presumptively the amount of wages for the balance of the term of the contract, subject only to reduction or defense because of claimant's duty to minimize same. No such principles apply to the case of landlord and tenant.

In the *Matter of Portage Rubber Company, supra,* the claimant had sold rubber to the bankrupt, to be delivered in May and June, 1921. Only part of the rubber was delivered, when, on May 31, 1921, a petition in bankruptcy was filed against the buyer. The court regarded bankruptcy as an anticipatory breach, and allowed a claim for damages, in an amount equal to the difference between market value and contract price, at the time of bankruptcy. Here again, liability was fixed and certain in quality, and could be readily ascertainable as to quantity.

To extend the dates of delivery further into the future, in the *Portage Rubber Company* case, or to extend the duration of the contract for personal services, in the *Schultz* v. *Guthrie* case, does not vary the quality of the bankrupt's liability but naturally may make any ascertainment of its quantity more difficult. Even in these cases, a limit may be reached beyond which all is guesswork and conjecture. The claim might not be capable of liquidation, and hence, in a special case, not provable.

But in all these cases, liability was clear and certain, and of a kind well-recognized in our law; the amount only was uncertain.

In the case of a landlord, two doubts must first be resolved before a claim could be proved.

1. Is there, or will there ever be, any liability at all of the tenant to his lessor, and
2. Can we forecast the extent of that liability?

Both doubts can be resolved only by vague speculation as to the future.

These claims do not rise to the dignity of debts (demands or claims) provable under a bankruptcy statute which seeks a division of assets among creditors who are such for a fair consideration.

The cases of *Wm. Filene's Sons. Co.* v. *Weed*, 245 U. S. 597 and *Gardiner* v. *William S. Butler & Co., Inc.*, 245 U. S. 603, do not militate against our contentions, but rather support them.

Both those cases arose out of the equity receivership suit against Wm. S. Butler & Co., Inc., and were not proceedings in bankruptcy.

In the *Filene* case, *supra*, the landlord made claim for damages amounting to the difference between rental value and the rent and other payments reserved, less the deduction of so much of the per annum payments of $20,000 as may have been made. The lease expressly provided for such damages in case of a receivership. In allowing the claim, this court itself distinguished the case from a statutory bankruptcy and said:

> "We perceive no ground that would justify the rejection of the petitioner's proof for the whole sum subject to the discount agreed. Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only question for the Courts is what the statutes prescribe. But when the Courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts

> except from the Court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 740, 741, 117 C. C. A. 503."

In the *Gardiner* case, *supra*, there were two claims filed, with respect to two separate leases. In the first claim, the lease was similar to that in the *Filene* case and for similar reasons the claim was allowed. In the second claim, the lease contained no such covenant of indemnity, and this court disallowed the claim and refused to follow the analogy of general mercantile contracts.

Considering both those cases together, so far as they may apply to a bankruptcy, the *dictum* is strongly to the effect that in bankruptcy, because of its statutory limitations on provable debts and because of the reciprocal provisions for discharging debts, such claims would not be allowed. In the equity proceedings, there is no limitation against proof of debts arising after suit filed, and consistent therewith, the holder of a claim thereafter arising is barred from independent action on his claim. The element of contingency as to date of accrual of liability plays no part in the equity proceedings. In bankruptcy, however, debts arising after bankruptcy are neither provable or dischargeable, and may be enforced after bankruptcy.

In bankruptcy, the claims of landlords, such as these, must be disallowed as contingent in quality and quantity, beyond hope of liquidation by calculation. Such

claims survive undischarged, and the claimants may secure payment out of future assets, when, if ever, the liability becomes fixed; they may not secure payment out of present assets, in competition with those creditors whose claims are presently fixed, and who may not be paid out of future assets.

Conclusion.

The fund to be distributed among creditors, consisting of the bankrupt's assets on the date of bankruptcy, should not be invaded by those who are not, at that time, among the group whose claims are present claims, whenever payable. Such is not the case of the landlord, who, for aught that appears, may never hold any claim.

Congress intended to exclude landlords' claims of the kind under discussion from the statutory bankruptcy scheme.

Finally, such claims are founded, if at all, on guess and speculation and are so contingent in quantity and quality as to make it grossly unjust to permit the landlords to share with those creditors whose claims are certain or fairly ascertainable.

On behalf of the large commercial interests of the country which have extended and are extending credits on the faith of the rules as they are and have been for many years, we ask that this court refuse to change the rules, and that the order of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes Cited.

BANKRUPTCY ACT OF 1898

30 Stat. 562 (1898)

Section 63:

"DEBTS WHICH MAY BE PROVED.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

BANKRUPTCY ACT OF 1867

14 Stat. 517

Section 19:

"And be it further enacted, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt.

All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to

stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods, or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

No debts other than those above specified shall be proved or allowed against the estate."

BANKRUPTCY ACT OF 1841

5 Stat. 440, 444

Section 5:

"And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the

laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuities and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in praesenti; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who

may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives."

BANKRUPTCY ACT OF 1800

Section 39:

"And be it further enacted, That every person who shall have bona fide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning."

ENGLISH BANKRUPTCY ACT OF 1883

46 and 47 Vict. Chapt. 52

Section 37:

"(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract,

promise, or breach of trust, shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court.

(6) If, in the opinion of the court, the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this act, be deemed to be a debt not provable in bankruptcy.

(7) If, in the opinion of the court, the value of the debt or liability is capable of being fairly established, the court may direct the value to be assessed, before the court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8) 'Liability' shall, for the purposes of this act, include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or under-

taking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

Section 55:

"(1) Where any part of the property of a bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavored to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee of all personal liability in respect to the property disclaimed as from the date when the property vested in him, but shall not, except so far as necessary for the purposes of re-

leasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3) The trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notice to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures tenants' improvements, and other matters arising out of the bankruptcy as the court thinks just. * * *

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury and may accordingly prove the same as a debt in the bankruptcy."

AMENDMENTS OF 1933

47 Stat., Chapt. 204

Section 73:

"Additional jurisdiction. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 202, 203, and 205 of this chapter. (July 1, 1898, c. 541, s. 73, as added Mar. 3, 1933, c. 204, s. 1, 47 Stat.)"

Section 74:

"Compositions and extensions. (a) Any person excepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by section 41 (b) of this title, accompanied in either case, unless further time is granted, by his schedules, stating that he is

insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor'. The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title. A claim for future rent shall constitute a provable debt and shall be liquidated under section 63 of this title.

(b) After the filing of such petition or answer the court may upon reasonable notice to creditors and attorneys of record appoint a custodian or receiver, who shall inventory the debtor's estate and exercise such supervision and control over the conduct of the debtor's business as the creditors at any meeting or the court shall direct.

(c) The custodian or receiver, or if none has been appointed, the court, shall promptly call the first meeting of creditors, stating in the notice that the debtor proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the debtor's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and the fifteen largest unsecured creditors, with the amounts owing to each as shown by the schedules. Any creditor may appear at or before the first meeting and controvert the facts alleged in the petition. In such case the court shall determine as soon as may be the issues presented, without the intervention of a jury, and unless the material allegations are sustained by the proofs shall dismiss the petition.

(d) At the first meeting (1) the debtor may be examined; (2) the creditors may nominate a trustee, who shall thereafter be appointed by the court in case it becomes necessary to liquidate the estate as provided in subdivision (1) of this section; and (3) the court shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made. The court may later extend such time for cause shown, and may require, as a condition of such extension, additional terms for the protection of and indemnity against loss by the estate as may be proper.

(e) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims if unsecured have been allowed, or if secured are proposed to be affected by an extension proposal, which number must represent a majority in amount of such claims; and the money or security necessary to pay all debts which have priority unless waived and the costs of the proceedings, and in case of a composition the consideration to be paid by the debtor to his creditors, have been deposited in such place as shall be designated by and subject to the order of the court.

(f) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal, and such objections as may be made to its confirmation.

(g) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; (2) it is for the best interests of all creditors; (3) that the debtor has not been guilty of any of the acts, or failed to perform any of the duties, which would be a ground for denying his discharge; and (4) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In application for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

(h) The terms of an extension proposal may extend the time of payment of either or both unsecured debts and secured debts the security for which is in the actual or constructive possession of the debtor or of the custodian or receiver, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the debtor during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control over the debtor's business or affairs during such period by a creditors' committee or otherwise, and for the termination of such period under certain specified conditions: *Provided,* That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24, of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

(i) Upon its confirmation an extension proposal shall be binding upon the debtor and his unsecured and secured creditors affected thereby: *Provided, however*, That such extension or composition shall not reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.

(j) Upon the confirmation of a composition the consideration shall be distributed as the court shall direct, and the case dismissed: *Provided*, That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the debtor and his property during the period of the extension in order to protect and preserve the estate and enforce the terms of the extension proposal.

(k) The judge may, upon the application of the parties in interest, filed at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

(l) If (1) the debtor shall fail to comply with any of the terms required of him for the protection of and indemnity against loss by the estate; or (2) the debtor has failed to make the required deposit in case of a composition; or (3) the debtor's proposal has not been accepted by the creditors; or (4) confirmation has been denied; or (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal when the court has retained jurisdiction of

the debtor or his property, the court may appoint the trustee nominated by the creditors at the first meeting, and if the creditors shall have failed to so nominate, may appoint any other qualified person as trustee to liquidate the estate. The court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or if the confirmation of his proposal has been denied. No order of liquidation or adjudication shall be entered in any proceeding under this section instituted by or against a wage earner or a person engaged chiefly in farming or the tillage of the soil unless the wage earner or a person engaged chiefly in farming or the tillage of the soil consents.

(m) The filing of a debtor's petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer as provided in subdivision (a) is filed. In proceedings under this section, except as otherwise provided therein, the jurisdiction and powers of the court, the title, powers, and duties of its officers and, subject to the approval of the court, their fees, the duties of the debtor, and the rights and liabilities of creditors, and of all persons with respect to the property of the debtor and the jurisdiction of appellate courts shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was filed and any decree of adjudication thereafter entered shall have the same effect as if it had been entered on that day.

(n) In addition to the provisions of section 29 of this title for the staying of pending suits, the court, on such notice and on such terms, if any, as it deems fair and equitable, may enjoin secured creditors who may be affected by the extension proposal from proceeding in any court for the enforce-

ment of their claims until the extension has been confirmed or denied by the court.

(o) The judges of the courts of bankruptcy shall appoint sufficient referees to sit in convenient places to expedite the proceedings under this section.

(p) Involuntary proceedings under this section shall not be taken against a wage earner. (July 1, 1898, c. 541, s. 74, as added, Mar. 3, 1933, c. 204, s. 1, 47 Stat.)"